Filed 3/7/11 P. v. Yount CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yolo)

THE PEOPLE, Plaintiff and Respondent, v. GEORGE VERN YOUNT, Defendant and Appellant.	C064074 (Super. Ct. No. CRF090986)

A jury convicted defendant George Vern Yount of transporting heroin and methamphetamine, and also of possessing heroin and drug paraphernalia. The jury deadlocked, however, on whether defendant possessed methamphetamine for sale, and that count was dismissed. Nonetheless, for purposes of sentencing, the trial court found that defendant failed his burden to show that he possessed the drugs for his personal use; accordingly,

the trial court found that defendant was not eligible for Proposition 36 probation.[1]

Defendant contends on appeal that the trial court erred and abused its discretion in finding him ineligible for Proposition 36 probation. He argues that the trial court's finding was "directly contradicted by the jury's verdict and the evidence."

A defendant claiming eligibility for Proposition 36 probation bears the burden of showing by a preponderance of the evidence that the possession was for personal use. Although the jury deadlocked on possession for sale, the trial court did not abuse its discretion in finding, for purposes of sentencing and based on evidence which included indicia of sales, that defendant failed to meet his burden and that he was not eligible for Proposition 36 probation. However, defendant is entitled to additional conduct credits. We will affirm the judgment as modified.

FACTS AND PROCEDURAL BACKGROUND

On Saturday, January 31, 2009, at 9:00 a.m., Woodland Police Officer Matthew Jameson was stopped at an intersection in the city. He saw a car travel toward him and then pull over to the side of the road. Defendant got out of the car and raised

---

[1] Defendant was sentenced to state prison for 12 years plus two consecutive years in unrelated case Nos. CRF086110 and CRF072760. On this court's own motion, we construe defendant's notice of appeal as including case Nos. CRF086110 and CRF072760. This motion is relevant to the conduct credit issue discussed in part II, *post*. Any party aggrieved by this procedure may petition for rehearing. (Gov. Code, § 68081.)

the hood. Jameson contacted him and asked whether he had anything illegal on him. Defendant said his pocket contained a pill bottle that he had found.

Officer Jameson searched defendant's jacket pocket and found a glass smoking pipe and a standard prescription pill bottle. The bottle contained eight small Ziploc baggies. Six of the baggies bore a printed logo of a marijuana leaf, one baggie bore a printed logo of red dice, and one baggie was clear. The baggies contained methamphetamine. The bottle also held a small bindle of marijuana.

A search of defendant's inside jacket pocket yielded heroin wrapped in cellophane. A second glass pipe was found in defendant's pants pocket.

Officer Jameson also found a cellular telephone and $166 in cash: one $100 bill, three $20 bills, one $5 bill, and one $1 bill.

Defendant told Officer Jameson that he had purchased the heroin and methamphetamine two days previously, on January 27, 2009, in West Sacramento and that it was for his personal use. He described the methamphetamine as a "[h]alf ounce" and a "quarter ounce," and he said those quantities would last him "a couple of weeks." He said that he ingests methamphetamine by smoking it.

Defendant testified that he takes pain killers and uses methamphetamine to counteract their sleep inducing effect and thus stay awake. He explained that he had purchased his dealer's entire inventory of methamphetamine, some of which the

dealer had prepackaged in smaller quantities to sell to others. Defendant denied that he sold drugs or that he had any prior convictions for selling drugs. Defendant is an admitted heroin addict.

Defendant testified that his Supplemental Security Income had been deposited into his bank account the day of his arrest (January 31, 2009), and that the money in his possession had been withdrawn from the account about an hour before he encountered Officer Jameson.

Defendant testified that he had paid $300 for the drugs in his possession and still owed a little more on the purchase. He had withdrawn sufficient funds from his account to pay for a family outing that day, but he had not withdrawn enough to pay the drug debt, which he planned to do the following day.

A jury convicted defendant of transportation of heroin (Health & Saf. Code, § 11352, subd. (a) [count 2]), transportation of methamphetamine (Health & Saf. Code, § 11379, subd. (a) [count 3]), possession of heroin (Health & Saf. Code, § 11350, subd. (a) [count 4]), and possession of controlled substance paraphernalia (Health & Saf. Code, § 11364, subd. (a) [count 5]).

However, on count 1, possession of methamphetamine for sale (Health & Saf. Code, § 11378), the jury deadlocked, a mistrial was declared, and count 1 was dismissed.

The trial court found that defendant had a prior narcotics conviction (Health & Saf. Code, § 11370.2, subd. (a)), and served five prior prison terms (Pen. Code, § 667.5, subd. (b)).[2]

The court denied defendant's request for probation. The court found that defendant was ineligible for a Proposition 36 program because he had not proven by a preponderance of evidence that the drugs at issue had been possessed for personal use. Defendant was sentenced to state prison for 12 years plus two consecutive years in unrelated cases. (Case Nos. CRF086110, CRF072760.)

DISCUSSION

I

Defendant contends the trial court erred by not readmitting him to Proposition 36 probation. He argues he was qualified for the program, and the evidence and jury verdict directly contradicted the court's finding that he was not eligible. We are not persuaded.

Proposition 36, the "Substance Abuse and Crime Prevention Act of 2000," is codified in sections 1210, 1210.1 and 3063.1, and division 10.8, commencing with section 11999.4, of the Health and Safety Code.

Section 1210, subdivision (a) defines a "'nonviolent drug possession offense'" as "the unlawful personal use, possession for personal use, or transportation for personal use of any

---

[2] Further undesignated statutory references are to the Penal Code.

controlled substance identified in Section 11054, 11055, 11056, 11057 or 11058 of the Health and Safety Code, or the offense of being under the influence of a controlled substance in violation of Section 11550 of the Health and Safety Code. *The term 'nonviolent drug possession offense' does not include the possession for sale*, production, or manufacturing *of any controlled substance* and does not include violations of Section 4573.6 or 4573.8." (§ 1210, subd. (a), italics added.)

Section 1210.1, subdivision (a) requires the trial court to grant probation with a drug treatment condition to any person convicted of a "nonviolent drug possession offense," unless the person is disqualified by the provisions of section 1210.1, subdivision (b), which are not here at issue.

Where, as here, a defendant claims eligibility for Proposition 36 probation, the defendant bears the burden of proof on the issue whether the possession or transportation was for personal use. (*People v. Barasa* (2002) 103 Cal.App.4th 287, 295-296.)

In *People v. Dove* (2004) 124 Cal.App.4th 1, a jury acquitted the defendant of possession of cocaine base for sale (Health & Saf. Code, § 11351.5) and convicted him of the lesser included offense of simple possession of cocaine base (Health & Saf. Code, § 11350, subd. (a)). (*People v. Dove, supra,* at p. 4.) Although the jury had thus refused to find that the drug was for sale, the trial court refused to find that it was for personal use; on that ground, the court ruled that the defendant was ineligible for probation and treatment under Proposition 36.

The appellate court held that a factual finding that a defendant did not possess or transport a controlled substance for personal use, for purposes of Proposition 36 sentencing, can be made by the trial court under a preponderance of the evidence standard and need not be made by a jury beyond a reasonable doubt. (*Ibid*.)

In this case, the trial court found that defendant was ineligible for Proposition 36 probation. The court stated: "Based on my analysis of the papers before me, the trial that was conducted in this case before a jury and before this Court, and the [section] 1204 hearing evidence, I find that [defendant] is not eligible for Prop 36 probation. I find that he committed crimes which indicate he is not eligible. I'm not going to address whether [defendant] is amenable or unamenable to treatment.[3] I don't [*sic*] find that he is not eligible for Prop 36 at this point in time. [¶] The defendant has the burden to show by a preponderance of the evidence that the drugs in his possession were not for sale but strictly for personal use. The Court is not convinced that [defendant] has met that burden. There was a substantial amount of heroin and a substantial amount of methamphetamine. The drugs were contained in numerous separate baggies. I believe a total of eight of them. I'm just not convinced that it was for personal use. And

---

[3] Because the trial court did not consider the issue of amenability to treatment, we reject defendant's argument that this case is similar to *People v. Castagne* (2008) 166 Cal.App.4th 727, which involved the amenability issue.

accordingly, based on the failure to meet that burden, I find him not eligible for Prop 36 probation or reinstatement on Prop 36."

Defendant contends this finding was error because the jury had deadlocked, 10 to two for acquittal, on the possession for sale count. Defendant relies on *People v. Harris* (2009) 171 Cal.App.4th 1488, in which the jury *unanimously* returned a special finding that the controlled substance had been transported for personal use within the meaning of section 1210, subdivision (a). (*People v. Harris, supra,* at p. 1494.)

Here, in contrast, no special finding was returned, and the deadlock on the possession for sale count simply meant that the jurors could not agree and did not reach a verdict on that count. There is no indication that the jurors were satisfied, either beyond a reasonable doubt or by a preponderance of evidence, that defendant's possession was for his personal use.

In this case it was undisputed that the multiple baggies of methamphetamine had been packaged, by someone, for sale. Defendant testified that his supplier, who had "already started packing it to sell to other people," instead "sold [defendant] the whole thing as it was," for his personal use.[4]

---

[4] The Attorney General construes defendant's phrase "other people" to be a reference, not to the supplier's other potential customers, but to an existing "cash buyer for his merchandise." From that premise, the Attorney General argues it was "questionable" whether a drug dealer would forego an all-cash sale to another person in favor of a cash-and-credit sale to

Defendant provided one possible explanation for the quantities and packaging of the found drugs, but the trial court was not legally compelled to find that this explanation was true by a preponderance of the evidence. As the appellate court held in *People v. Dove, supra,* 124 Cal.App.4th at page 4, the trial court can make its own finding for purposes of Proposition 36 sentencing.

Defendant contends that, if the trial court's finding of Proposition 36 ineligibility was not legal error, then it was an abuse of discretion. In his view, Proposition 36 is "tailor-made" for someone like him and is intended to "keep people like [him] out of prison." Such an argument, on this record, is not enough to establish that the trial court abused its discretion.

Finally, defendant faults the Yolo County Probation Department for having failed to "assist [him] when he specifically reached out for help." This claim is based on his testimony at the probation hearing that, in late 2008, he had relapsed due to difficulties in his personal life. He "voluntarily went into Probation to find different types of help and was told to basically go find it." He later reiterated, "I went in and asked for that help. I was turned away and was told to get it and come back and see them."

Defendant argues that the probation department "should bear an equal responsibility for [his] relapse"; thus, he "deserves

---

defendant. In our view, it is unlikely defendant's remark refers to a ready and willing cash purchaser.

another chance to get it right." For this reason alone, he claims the trial court "should have . . . returned [him] to Proposition 36 probation," notwithstanding the lack of evidence that the drugs were for his personal use.

Defendant offers no argument or authority for the proposition that the probation officer's failure or omission somehow relieves him of his obligation to meet the statutory criteria for admission or readmission to Proposition 36 probation. Nor are we aware of any such authority. The trial court's failure to reinstate defendant on Proposition 36 probation was not error or an abuse of discretion.

II

We deem defendant to have raised whether amendments to Penal Code sections 2933 and 4019 entitle him to additional conduct credits. (See, e.g., Misc. order No. 2010-002.)

The amendments to section 4019 apply to all appeals pending as of January 25, 2010. (See *In re Estrada* (1965) 63 Cal.2d 740, 745 [statutory amendments lessening punishment for crimes apply "to acts committed before its passage provided the judgment convicting the defendant of the act is not final"]; *People v. Hunter* (1977) 68 Cal.App.3d 389, 393 [applying the rule of *Estrada* to an amendment involving custody credits]; *People v. Doganiere* (1978) 86 Cal.App.3d 237 [applying the rule of *Estrada* to an amendment involving conduct credits].)

On September 28, 2010, as an urgency measure effective on that date, the Legislature enacted Senate Bill No. 76 (Sen. Bill No. 76), which amended section 2933, regarding presentence

conduct credits for defendants sentenced to state prison. The amendment gives qualifying prisoners one day of presentence conduct credit for each day of actual presentence confinement served (Sen. Bill No. 76, § 1; § 2933, subd. (e)(1), (2), (3)), thereby eliminating the loss of one day of presentence conduct credit under the rate specified by Senate Bill No. 18 (2009-2010 3d Ex. Sess.) when the person served an odd number of days in presentence custody. It also eliminates the directive in section 4019 that no presentence conduct days are to be credited for commitments of fewer than four days. (Sen. Bill No. 76, § 1; § 4019, subd. (g).)

The amendment does not state that it is to be applied prospectively only. Consequently, for the reason we conclude the amendment increasing the rate for earning presentence conduct credit, effective January 25, 2010, applies retroactively to defendants sentenced prior to that date, we conclude the new rate provided in Penal Code section 2933 applies retroactively to include defendants who were sentenced prior to January 25, 2010.[5]

---

[5] Senate Bill No. 76 also amends section 4019 to reduce the amount of presentence conduct credits earned by qualifying prisoners. With the enactment of Senate Bill No. 76, the calculation of such credits is now based on the rate that existed prior to Senate Bill No. 18, which increased the rate. (Sen. Bill No. 76, § 2; § 4019, subds. (b), (c), (f).) However, this amendment applies prospectively only, i.e., only to sentences imposed on or after September 28, 2010. (§ 4019, subd. (g).)

Consequently, defendant is entitled to the following conduct credits: 46 days in case No. CRF072760; 23 days in case No. CRF086110; and 124 days in case No. CRF090986.

DISPOSITION

The judgment is modified to award defendant 46 days' conduct credit in case No. CRF072760; 23 days' conduct credit in case No. CRF086110; and 124 days' conduct credit in case No. CRF090986. As so modified, the judgment is affirmed. The trial court is directed to prepare an amended abstract of judgment and to forward a certified copy to the Department of Corrections and Rehabilitation.

MAURO, J.

We concur:

BLEASE, Acting P. J.

HULL, J.